IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 513

WILLIE NORVELL,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

PETITIONER'S REPLY BRIEF

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(1)

Foreword

The chief significance of the State's brief lies in its omissions. No attempt is made to come to grips with petitioner's theory or argument. Rather, by a kind of confession and avoidance, and for the first time in this case, the State argues the doctrine of waiver, coupled with the

subtle suggestion that petitioner should not be granted a new trial because Illinois may have difficulty in proving a case against him at this time.

The State has not even attempted to defend the reasoning advanced by the Illinois Supreme Court in denying relief to petitioner. Instead, the ground of the decision below is misstated to comport with the waiver theory introduced for the first time in this Court.

The State's brief is likewise significant for its lack of reference to the opinion of the Supreme Court of Illinois on remand in the *Griffin* case, in which it was expressly held that the doctrine of waiver would not be applied to persons in petitioner's situation.

The State has ignored petitioner's citation of the many cases in which courts throughout this country (including the court below) have awarded new trials where no adequate record is available for appeal (Petitioner's Brief, pp. 26 to 33).

We shall address each of the State's contentions, seriatim, as they appear in the State's brief.

(2)

Petitioner has not waived or failed to exhaust his right to appellate review of his trial.

The State's primary contention is that because petitioner failed to apply for a transcript for appeal immediately upon his conviction in 1941, and to contend at that time that the State's failure to provide him with a gratis transcript violated his constitutional rights, he has waived or failed to exhaust his right to appellate review, and he is now precluded from asserting that right. The State says

(Brief pp. 6-7) that if petitioner had made this contention in 1941, his position ultimately would have been sustained by this Court, presumably while the reporter still lived, hence the present problem would have been avoided.

We have several comments upon this argument:

First. This contention is asserted for the first time in this Court. It was not made below. We ask the Court to scan the brief filed below by the State, which is included in the Record on Appeal here.

Second. Under Illinois law when petitioner was convicted in 1941, he had 50 (later changed to 100) days from the date of judgment within which to obtain the trial transcript and have it certified. (Ch. 110, § 259.70A, Ill. Rev. Stat. 1939.) Thereafter, he had 20 years within which to file a praecipe for writ of error in the Supreme Court of Illinois and thus obtain, as of right, a complete direct review of the trial by writ of error. (Ch. 38, § 771, Ill. Rev. Stat. 1939; *People* v. *Murphy*, 296 Ill. 532, 533 (1921); *People* v. *Munroe*, 15 Ill. 2d 91, 94 (1958).)*

Third. Immediately after his trial, petitioner, who was then indigent and no longer represented by counsel, made inquiries of the court reporters as to how to obtain the transcript, and what it would cost. He applied for and received an extension of 90 days for certification of the transcript. (Tr. 2.) However, because he was a pauper, petitioner was unable to procure the transcript, and the time for certification expired. (Tr. 36-37, 42, 49-50.)

Petitioner remained in prison. Mr. Allen, the reporter at petitioner's trial, died in 1949. (Tr. 6.)

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* Reduced to 3 years in 1961. (Ch. 38, § 769.1, Ill. Rev. Stat. 1961.)

Fourth. In 1956, on remand from this Court's decision in the *Griffin* case, the Illinois Supreme Court carefully examined the question whether the State was required to supply transcripts to persons (such as petitioner) convicted before April 23, 1956 (the date of the *Griffin* decision by this Court) who were indigent at the time of their convictions but who did not then ask for a transcript or contend that their constitutional rights were violated because the State failed to provide a free transcript. The court considered whether to adopt the rule that indigent persons convicted before *Griffin* who failed to contend immediately after their convictions that they had a constitutional right to a free transcript, had waived the right to a transcript. On that subject the court said (9 Ill. 2d at 167):

> "We have considered the applicability of doctrines of waiver. Our rules require that reports of proceedings at the trial be presented to the trial judge for approval within 100 days from the entry of the judgment, or within an extended period fixed by the trial judge. It could be held that a prisoner who did not request a free transcript within the time so fixed has waived his right. But waiver assumes knowledge, and we are unwilling to hold, under the circumstances of this case, that the constitutional rights of prisoners have been waived."

The brief filed in this Court by the Attorney General of Illinois gives the impression he is unaware that, seven years ago, the Supreme Court of Illinois rejected the waiver argument he belatedly seeks to advance in this case. This holding vitiates the "dilemma" which the State says is confronting petitioner (State's brief, p. 6), because the Illinois Supreme Court has expressly held that *Griffin* applies retrospectively in Illinois, and failure to argue the *Griffin* principle at the time of conviction is not a waiver of the right of current review.

Fifth. To comply with this Court's opinion in *Griffin*, as applied on remand as stated above, the Supreme Court of Illinois promulgated Rule 65-1 providing that the State shall pay for transcripts for indigent convicted defendants. Subsection (2) of that rule [Appendix A to Petitioner's Brief, pp. 35-38], dealing with persons convicted before April 23, 1956, dispenses with the time period for certification of the transcript if the defendant files a verified petition in the form prescribed on or before March 1, 1957. The rule does *not* require that the defendant have contended at the time of his conviction that failure to provide a free transcript violated his constitutional rights. This rule provides that if the stenographic notes cannot be transcribed "the court shall deny the petition" for a free transcript; the rule is silent as to whether, in this situation, the court should thereafter grant other relief to the petitioner.

Sixth. Pettiioner filed a timely petition under Rule 65-1(2), and an order was entered by the trial court directing that the transcript be prepared at State expense. (Tr. 2-3.) When it was discovered that the complete transcript could not be compiled, petitioner filed a motion for new trial, the denial of which is now before this Court.

Seventh. Illinois, having taken giant steps toward making appellate review available to all indigent defendants, whenever convicted, should not and under the 14th Amendment may not deny relief to those few defendants who had Official Court Reporters who wrote illegible shorthand and who died before *Griffin* was announced and complied with by the errant states. Whether the Official Court Reporter was healthy, or a careful writer, should not determine whether or not a convicted person is afforded appellate review. This distinction is more capricious than one based

on the defendant's wealth. It would violate the Equal Protection clause to hold that a convicted pauper has waived or lost his right to appellate review of his trial, or to alternative relief, *if but only if* it subsequently appears that the Official Reporter has died and his notes cannot be transcribed. The State may not rule the very same conduct to have prejudicial effect in some cases and not in others where the distinction depends upon the happening of subsequent events (*viz.*, the reporter's death and the inability to read his notes) induced by the State's own misconduct and over which the defendant has no control.

Eighth. This Court and the court below have recognized that the duty was on the State of Illinois, in 1941 as in 1956, to provide a transcript to petitioner without cost so that he could obtain appellate review of his conviction. The fault rests upon the State for not making appellate review available to petitioner in the eight years after the trial while Mr. Allen lived, and not with petitioner for failing to raise a federal constitutional issue at the time of his trial. This Court should not place upon a mentally defective, imprisoned indigent the obligation of presenting the *Griffin* issue in 1941. Most of the many defendants who have already secured free transcripts and full review of their trials did not do so; there is no sound reason why this requirement should be imposed on petitioner.

Ninth. Petitioner has not waived any of his rights. In *Johnson* v. *Zerbst*, 304 U.S. 458 (1938), it is said:

> "It has been pointed out that 'courts indulge every reasonable presumption against waiver' [citing case] of fundamental constitutional rights and that we 'do not presume acquiescence in the loss of fundamental rights' [citing case]. A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege."

This is the salutary principle which impelled the Illinois Supreme Court to reject the waiver argument on remand in the *Griffin* case.

Tenth. Rule 65-1(2) of the Rules of the Supreme Court of Illinois was designed to put indigents convicted before Griffin in the position they would have been in if, at the time of their convictions, free transcripts had been available to them. Under these circumstances, basic principles of justice, overwhelming precedent, and the federal Constitution, require that a new trial be granted to a convicted defendant who, through no fault of his own, cannot obtain a transcript. This is the only fair way of solving the unfortunate dilemma presented here.

The State of Illinois should now be required to do for petitioner that which it would do for him if this situation arose in a current case, just as Clyde Castle was granted a new trial by the Supreme Court of Illinois in September, 1961 because he was unable to get a transcript of his 1957 trial (see Petitioner's Brief pp. 24-25.)

(3)

Respondent's authorities distinguished.

The State places its principal reliance upon two cases dealing with failure to exhaust state remedies as a prerequisite to use of federal habeas corpus. Those cases are inapposite since this case comes here on direct review from the Illinois Supreme Court, petitioner having exhausted all available Illinois remedies.

Darr v. Burford

Darr v. *Burford*, 339 U.S. 200 (1950) (State's Brief pp. 7-8) was an habeas corpus proceeding commenced in a federal court to obtain relief from a judgment of conviction

entered by a state court. Darr had not filed a petition for certiorari to this Court from the refusal of the state court to grant collateral relief. The only issue presented to and decided by this Court was whether Darr's failure to seek certiorari precluded recourse to the federal court.

In contrast, this case is here on certiorari directly from the Illinois Supreme Court, which affirmed denial of petitioner's motion for new trial.

Brown v. *Allen*

Brown v. *Allen*, 344 U.S. 443 (1953) (State's Brief pp. 8-10), also involving federal habeas corpus to attack a state court judgment, holds (*inter alia*) that states may enforce a reasonable jurisdictional time limit for appeal. This rule is inapplicable at bar because, in *Griffin*, Illinois' system of criminal appeals was found constitutionally inadequate as applied to paupers; after *Griffin*, Illinois relaxed its time limitations for certification of transcripts for those who, like petitioner, were foreclosed from promptly obtaining a transcript because of their indigence. Petitioner complied with the conditions set forth in Rule 65-1(2), and the only reason that he is now foreclosed from appeal is because he cannot obtain an adequate transcript upon which to premise his appeal, which in turn is caused by the court reporter's death and the illegibility of his notes. But, prescinding from these surface causes of the difficulty, the underlying cause of petitioner's situation is petitioner's indigence coupled with the State's failure in 1941 (or at any time until Mr. Allen's death in 1949) to grant petitioner a means of appeal without regard to his lack of funds. Thus, in the final analysis, the situation presented here was brought about by Illinois' dereliction. Petitioner is blameless; had he been accorded due process

and equal protection of the law in 1941 (or at any time until Mr. Allen's death) he could have had his conviction reviewed, as was his right. Now it is too late. Review of the 1941 trial is forever foreclosed. The only fair solution is to award petitioner a new trial which, if it results in a conviction, may be reviewed in due course.

(4)

The State has failed to distinguish the Eskridge, Westbrook and Patterson cases, and the other authorities on which petitioner relies.

Eskridge v. *Washington*

The State purports to distinguish *Eskridge* v. *Washington State Board*, 357 U.S. 214 (1958), on the ground that "Eskridge, unlike the instant petitioner, exhausted his State remedies before they were barred by lapse of time." (Brief, p. 3.) But the facts of the *Eskridge* case show that Eskridge raised no constitutional contention at the time of his trial. Eskridge, convicted in 1935, immediately applied for a free transcript under a Washington statute which provided that the trial judge could grant a free transcript "if in his opinion justice will thereby be promoted." The trial judge denied the motion. Eskridge then moved in the Washington Supreme Court for a writ of mandate ordering the trial judge to have a transcript furnished for his appeal; this petition and Eskrdige's appeal were dismissed on motion of the state. (357 U.S. at 215.)

Thus, so far as we are able to determine, it was in 1956, after *Griffin*, when Eskridge *for the first time* contended that the failure in 1935 to provide a free transcript violated his federal constitutional rights.

The State is also in error in asserting that petitioner here has not complied with all time conditions imposed by Illinois for appeal. Petitioner applied for a transcript under Rule 65-1(2) well within the permitted period, and he sought writ of error before 20 years elapsed from his conviction, the applicable period under Illinois law at the time. There is no difference in principle between this case and *Eskridge*.

Westbrook v. *Randolph*

The State's attempt to distinguish *U.S. ex rel. Westbrook* v. *Randolph*, 259 F.2d 215 (7th Cir. 1958) is likewise abortive. It is said that "Westbrook 'filed a timely notice of appeal, asking for and receiving several extensions of time, aggregating about eight months in which to file his bill of exceptions' " (Brief, p. 3), and that he "made *timely* claim of a Federal constitutional right to that transcript" (Brief, p. 8).

Notice of appeal is not now and never has been required in Illinois for appeal from a criminal conviction (defendant simply files a praecipe for writ of error, or the record, in the Supreme Court of Illinois*); nor did Westbrook file such a notice (notwithstanding the statement in the opinion of the Court of Appeals to the contrary, 259 F. 2d at 216). Westbrook, like petitioner, sought and received extensions of time within which to have the transcript certified by the trial judge and filed in the trial court (Westbrook's extension was for about 300 days while petitioner's was for 90). Both petitioner and Westbrook were unable to obtain the transcript—Westbrook because the reporter became ill and then lost his notes,** petitioner because he

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* Notice of appeal as an alternative procedure to obtain review in criminal cases was first introduced in Illinois in 1961. (Ch. 38, §769.1, Ill. Rev. Stat. 1961.).

** The Court of Appeals in the *Westbrook* case states that Westbrook "offered to pay for" the trial transcript (259 F.2d at 216). Therefore, the statement in petitioner's opening brief (page 23) that Westbrook was at all times a pauper is in error.

was indigent and could not pay the reporter, and in both cases the time for certification lapsed.

But the important point is this: contrary to the assertion as page 8 of the State's brief, Westbrook did *not* immediately assert a constitutional right to a free transcript; he first advanced this contention in 1952, four years after his conviction (see 259 F.2d at 216).

Thus, at and immediately after his trial, before the time for certification of the transcript expired, Westbrook did no more to obtain a transcript than petitioner except offer to pay the reporter.

After *Griffin,* the Illinois Supreme Court revived the time for certification for Griffin, Westbrook, petitioner, and scores of others. Westbrook never proceeded under Rule 65-1(2) because by 1956 it was known that the shorthand notes of his trial were lost. Petitioner made timely but fruitless efforts to obtain the full transcript of his trial under that rule. There is no sound distinction between the two cases.

Patterson v. *Medberry*

The State has neither referred to nor attempted to distinguish *Patterson, Warden* v. *Medberry,* 290 F.2d 275 (10th Cir. 1961), *certiorari denied,* 368 U.S. 839, *rehearing denied,* 368 U.S. 922 (Nov. 21, 1961), discussed at pages 21 to 23 of petitioner's opening brief.

Other Cases

Also ignored by the State are the *Castle* and *Williams* cases (Petitioner's Brief, pp. 24-26) in which the Supreme Court of Illinois recently approved awarding new trials to indigent defendants who were unable to obtain transcripts for appeal.

Nor does the State advert to the numerous cases from all over the United States (Petitioner's Brief, pp. 26-32) in which courts have granted new trials under the circumstances presented here.

(5)

The State has misstated the ground of the decision of the court below.

At pages 8 and 10 of its brief, the State purports to summarize the ground of the decision below by the Supreme Court of Illinois. At page 8 it is said:

> ". . . Illinois' highest court denied relief in this case, not upon the ground that petitioner would not have been entitled to a free transcript had he made timely claim of a Federal constitutional right to that transcript . . . but upon the ground that, no such application having been made, petitioner's conviction has become final."

And at page 10 the State asserts:

> "It is clear from a reading of the opinion of the Supreme Court of Illinois in the instant case that what that court held and all that it held was that an indigent prisoner who waits many years after his conviction and until long after the death of the court reporter who inscribed these shorthand notes of his trial is not entitled to freedom if the State cannot convict him upon a trial *de novo*."

Petitioner submits that the State has distorted and misstated the holding of the court below. The opinion below is *not* grounded upon petitioner's failure to contend in 1941 that he had a constitutional right to a new trial; the opinion below says *nothing* about waiver of the right to a transcript; it says *nothing* about petitioner's waiting "until long after the death of the court reporter" to apply for a

free transcript; it says *nothing* about the State's inability to "convict [petitioner] upon a trial *de novo*."

The short of the matter is that the Attorney General has advanced a new argument in this Court, and is attempting to show, contrary to the fact, that the court below accepted his argument and disposed of the case on the basis of it.

(6)

The State's discomfort affords no basis for depriving petitioner of his constitutional rights.

The State implies that this Court should reject petitioner's plea for new trial because of the difficulty the State may experience in presenting proof of guilt at this time in this and similar cases. (State's brief, pp. 5, 6, 10.) We submit, to the contrary, that this Court should hold steadfast to the rule that a citizen's rights may not be diluted or denied because the government may be caused inconvenience or embarrassment in recognizing those rights. Perhaps the Court will recall the similar *in terrorem* argument advanced by the Attorney General of Illinois in the *Griffin* case; there he said to this Court (Brief for Respondent, p. 10):

> "The cost of affording typewritten transcriptions of such shorthand notes as are actually taken in the Criminal Court of Cook County and the Circuit Courts of cognate jurisdiction in Illinois' one hundred and one other counties *would alone be prohibitive*. But if petitioners' contention is to be given its necessary full effect, the cost of providing a stenographer to take notes and upon demand transcribe his notes in all of the Illinois courts that have jurisdiction to imprison defendants, either by mandatory sentence of imprisonment or as alternative to the non-payment in whole

> or in part of fines imposed, *will impose a wholly impossible financial burden upon the resources of Illinois.*" (Emphasis added.)

This Court properly disregarded this "practical" contention, and now we find, seven years later, that the system is working smoothly, and, contrary to the Attorney General's dire predictions, Illinois has not been driven into insolvency from the relatively modest typing charges resulting from Rule 65-1. The most significant effect of that rule's operation is the large number of trials which have been found to be infected with error so prejudicial as to require retrial (see Petitioner's Brief, Appendix B, pp. 39-46).

Apropos in the comment on this subject in *Patterson, Warden* v. *Medberry,* 290 F.2d at 278:

> ". . . While it is unfortunate that at this late date the State of Colorado will be confronted with releasing one convicted of murder, or with the difficult but not insurmountable task of retrying him, yet, as said in the *Griffin* case, it is traditional in our system of government that 'constitutional guaranties of due process and equal protection both call for procedures in criminal trials which allow no invidious discriminations between persons and different groups of persons.'"

Conclusion

Recently, a scholar in the field of federal-state relations in criminal cases has said:

> ". . . The possibilities of error, oversight, arbitrariness and even venality in any human institution are such that subjecting decisions to review of some kind answers a felt need: it would simply go against the grain, today, to make a matter as sensitive as a criminal conviction subject to unchecked determination by a single institution." *Bator*, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv.L.Rev. 441, 453 (1963).

No appellate tribunal can ever determine whether prejudicial error occurred at petitioner's 1941 trial, or whether the State proved a *prima facie* case against petitioner. If the right of appeal is to be afforded to petitioner without regard to his poverty and other circumstances which he did not induce, he must be granted a new trial.

Respectfully submitted,

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